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In the Supreme Court of the United States

OCTOBER TERM, 1993

STATES OF OKLAHOMA AND TEXAS, PLAINTIFFS

v.

STATE OF NEW MEXICO, DEFENDANT

ON JOINT MOTION OF THE PARTIES FOR ENTRY OF STIPULATED JUDGMENT AND DECREE

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

The States of Oklahoma and Texas brought this original action against the State of New Mexico to resolve a dispute under the Canadian River Compact, Act of May 17, 1952, ch. 306, § 1, 66 Stat. 74. This Court granted Oklahoma and Texas leave to file their complaint, *Oklahoma* v. *New Mexico*, 484 U.S. 808 (1987), and referred the matter to a Special Master, 484 U.S. 1023 (1988). On October 15, 1990, the Special Master submitted his report. See 498 U.S. 956 (1990). The Court considered the exceptions filed by the

three States, sustained them in part and overruled them in part, and remanded the case for further proceedings. 111 S. Ct. 2281 (1991). On May 28, 1993, the Special Master submitted a report on the remanded issues, and shortly thereafter, Oklahoma, Texas, and New Mexico filed a joint motion for entry of a stipulated judgment and decree. On June 28, 1993, this Court invited the Solicitor General to file a brief expressing the views of the United States. 113 S. Ct. 3031 (1993).

1. The Canadian River rises in New Mexico near the Colorado-New Mexico border and flows south and then east across New Mexico, through the Texas panhandle, and across Oklahoma until it eventually joins the Arkansas River. The United States and the States have constructed three significant water storage projects on the River: (a) Conchas Dam in New Mexico, about 30 miles northwest of Tucumcari, which provides water to the Bureau of Reclamation's Tucumcari Project; (b) Ute Dam and Reservoir in New Mexico, about 45 miles downstream from Conchas Dam; and (c) Sanford Dam in Texas, about 165 river miles downstream from Ute Reservoir. See *Oklahoma* v. *New Mexico*, 111 S. Ct. at 2283-2286; Special Master's Report 1a-2a (Oct. 15, 1990) (reproducing maps).

The Canadian River Compact, ratified by Oklahoma, Texas, and New Mexico in 1951 and approved by Congress in 1952, 66 Stat. 74, allocates the Canadian River's flow among the three States. The Compact apportions the Canadian River water primarily by imposing restrictions on the impoundment of water in New Mexico and Texas. The Compact also creates an interstate agency, the Canadian River Commission,

to administer the Compact. The Commission consists of a non-voting presiding officer designated by the President of the United States and three voting members designated by the respective States. See Special Master's Report 3a-9a (Oct. 15, 1990) (reproducing Compact).

Article IV of the Compact limits New Mexico's use of the Canadian River's waters as follows:

> (a) New Mexico shall have free and unrestricted use of all waters originating in the drainage basin of Canadian River above Conchas Dam.
>
> (b) New Mexico shall have free and unrestricted use of all waters originating in the drainage basin of Canadian River in New Mexico below Conchas Dam, provided that the amount of conservation storage in New Mexico available for impounding these waters which originate in the drainage basin of Canadian River below Conchas Dam shall be limited to an aggregate of 200,000 acre-feet.

66 Stat. 75. Article II(d) of the Compact defines "conservation storage" as

> that portion of the capacity of reservoirs available for the storage of water for subsequent release for domestic, municipal, irrigation and industrial uses, or any of them, and it excludes any portion of the capacity of reservoirs allocated solely to flood control, power production and sediment control, or any of them.

66 Stat. 75.

2. Beginning in 1982, New Mexico took steps to enlarge Ute Reservoir from its original capacity of 109,600 acre-feet to a capacity of 272,800 acre-feet. In

addition, New Mexico designated 49,900 acre-feet of storage immediately above the reservoir outlet works as a "desilting pool," and it treated the desilting pool as exempt from the Compact's limit on conservation storage on the theory that the pool was allocated to "sediment control." 66 Stat. 75. Texas and Oklahoma objected to New Mexico's addition of physical reservoir capacity below Conchas Dam in excess of 200,000 acre-feet and to New Mexico's claimed exemption for the "desilting pool." Those objections provided the primary impetus for this original action. See Special Master's Report 16-22 (Oct. 15, 1990).

The Special Master examined the evidence, considered the legal arguments of the States, and prepared a report containing a recommended disposition of the matter. He concluded that Article IV(b) of the Canadian River Compact imposes a limit on the amount of water New Mexico may store, rather than a limit on the physical reservoir capacity. He also determined that waters originating in the Canadian River Basin above Conchas Dam, but reaching the mainstream of the river below the Conchas Dam as a result of dam spills and releases or Tucumcari Project seepage and return flows, are subject to Article IV(b)'s 200,000 acre-feet storage limitation. The Special Master concluded that the controversy over the "desilting pool" should be referred to the Canadian River Commission for possible resolution. He also concluded that if the Court agreed with his proposed disposition of the foregoing issues, then New Mexico should be found in violation of the Compact insofar as it did not count Conchas Dam spills and releases and Tucumcari Project seepage and return flows as part of the 200,000 acre-feet limitation, and the case should be

returned to the Special Master for a determination of appropriate relief. Special Master's Report 24-25 (Oct. 15, 1990); see *Oklahoma* v. *New Mexico*, 111 S. Ct. at 2286.

This Court considered the States' various exceptions to the Special Master's recommended disposition and largely rejected them. *Oklahoma* v. *New Mexico*, 111 S. Ct. at 2286-2293. The Court agreed with the Special Master's conclusion that Article IV(b) limits water storage rather than reservoir capacity, 111 S. Ct. at 2286-2287, and that the 200,000 acre-feet storage limitation applies to Conchas Dam spills and releases and Tucumcari Project seepage and return flows, *id.* at 2287-2292. The Court disagreed, however, with the Special Master's recommendation that the "desilting pool" issue should be referred to the Canadian River Commission. The Court explained that it has " 'a serious responsibility to adjudicate cases where there are actual, existing controversies' between the States over the waters in interstate streams." *Id.* at 2292-2293 (quoting *Arizona* v. *California*, 373 U.S. 546, 564 (1963)). The Court saw "no legal basis for the Master refusing to decide the question," and it accordingly remanded the issue to the Master "for such further proceedings as may be necessary and a recommendation on the merits." 111 S. Ct. at 2293.

3. On remand, the Special Master took additional evidence, allowed further briefing, and prepared a draft report. The parties then negotiated a settlement of the dispute and prepared a stipulated judgment and decree, which the Special Master approved. On May 28, 1993, the Special Master submitted his Report on Remand, which recommends that this

Court grant the parties' simultaneously filed joint motion for entry of the stipulated judgment and decree.

DISCUSSION

The States of Oklahoma, Texas, and New Mexico request that this Court enter a stipulated judgment and decree concluding this original action. The United States submits that the States have reached an appropriate resolution of the matter insofar as the proposed judgment and decree clarify the legal obligations of the parties with respect to the issues in dispute in this litigation. However, the provisions of the proposed decree contained in paragraph 10, which additionally address the authority of the Canadian River Commission, should be eliminated.

1. When this Court exercises its original jurisdiction, it possesses powers analogous to those of a trial court, including the power to resolve disputed matters through the entry of a judgment or decree proposed by the parties. See *New Hampshire* v. *Maine*, 426 U.S. 363, 368 (1976). That power derives from a court's authority to adjudicate legal issues, and not merely from the parties' consent. See *System Federation No. 91, Railway Employees' Dep't* v. *Wright*, 364 U.S. 642, 651 (1961). Thus, the Court should reject a stipulated judgment or consent decree unless the requested order is "judicial" in the sense that it resolves the Article III case or controversy before the Court. Compare *New Hampshire* v. *Maine*, 426 U.S. at 368-369 (adopting a consent decree resolving a boundary dispute "consistent with our Art. III function and duty") with *Vermont* v. *New York*, 417 U.S. 270, 277 (1974) (per curiam) (rejecting a consent decree requiring the Court to undertake an

"arbitral" function). Furthermore, the Court should reject a stipulated judgment or consent decree that rests on a mistake of law or otherwise provides an inappropriate resolution of the case. The Court is not obligated to enter a judgment on an incorrect or improper basis "simply because the parties agree upon it." *United States* v. *Burke*, 112 S. Ct. 1867, 1877 (1992) (Scalia, J., concurring in the judgment).

2. The proposed stipulated judgment poses no difficulties under the foregoing principles. In accordance with this Court's 1991 decision and the proceedings on remand, the judgment declares that New Mexico has been in violation of Article IV(b) of the Canadian River Compact since 1987. Proposed Stipulated Judgment ¶ 1. It also establishes reservoir storage levels and a schedule of water releases during the next ten years to bring New Mexico into compliance with the Compact and to compensate Oklahoma and Texas for the violation. *Id.* ¶¶ 2-3. Finally, the judgment provides that New Mexico shall pay attorneys' fees to Oklahoma and Texas in a specified amount, that Oklahoma and Texas shall release New Mexico from all other claims arising out of New Mexico's violation, that the provisions of the proposed judgment shall take precedence over the proposed decree, and that the costs in this case shall be equally divided among the parties. *Id.* ¶¶ 4-7. As the Special Master explains, the proposed judgment fairly and practicably implements this Court's decision. See Special Master's Report on Remand 7-8 (May 28, 1993). The United States has no objection to the entry of the proposed judgment.

3. The proposed decree is more problematic. The 12-paragraph decree provides an appropriate resolu-

tion of the issues in this litigation insofar as it clarifies how the Compact governs particular water storage activities. But the decree also includes novel provisions, contained in paragraph 10, that allow the Canadian River Commission to waive or modify "the obligations imposed on New Mexico by this Decree" and provide that the Commission may take "any necessary and proper actions, not in violation of any provisions of the Compact, to implement the Compact purposes."

a. Paragraphs 1 and 2 are clearly appropriate because they effectuate this Court's 1991 decision. Paragraph 1 implements the Court's interpretation of Article IV(a) of the Compact by allowing New Mexico free and unrestricted use of the Canadian River for uses above Conchas Dam, which include diversions for use on the Tucumcari Project and the Bell Ranch. See *Oklahoma* v. *New Mexico*, 111 S. Ct. at 2287-2288, 2293 n.12. Paragraph 2 implements the Court's interpretation of Article IV(b) by limiting New Mexico to storage of not more than 200,000 acre-feet below Conchas Dam, subject to recognized exceptions. See 111 S. Ct. at 2291-2292; see generally Special Master's Report on Remand 8-9 (May 28, 1993).

Paragraphs 3 through 6 are also appropriate, because they resolve the "desilting pool" issue through terms that are consistent with the Compact. Paragraph 3 clarifies that the Canadian River Commission may classify water in a multiple purpose reservoir that is stored "primarily" for flood control, power generation, or sediment control as exempt from the conservation storage limitation. Paragraph 4 provides that water stored below a reservoir's outlet works is generally exempt from conservation storage, while paragraph 5 requires a State to seek Commission approval before redesignating storage volumes for flood control, power production, or sediment control. Paragraph 6 specifies that water stored in Ute Reservoir above elevation 3725 (*i.e.*, the so-called "desilting pool," see *Oklahoma* v. *New Mexico*, 111 S. Ct. at 2292 n.10) shall be treated as conservation storage, provided that New Mexico may seek redesignation in the future based on changed circumstances. See Special Master's Report on Remand 9-11.

Paragraphs 7 through 9 are appropriate because they resolve other disputed operational matters through terms that are consistent with the Compact. Paragraph 7 exempts certain small reservoirs from classification as conservation storage, while paragraph 8 directs New Mexico to release water from storage in accordance with the Compact, the stipulated judgment, and safe operational practices. Paragraph 9 directs New Mexico to conduct sediment surveys at Ute Reservoir every ten years to establish the reservoir's capacity for conservation storage. See Special Master's Report on Remand 11-12.

b. Paragraphs 10 through 12 contain general provisions concerning the relationship between the decree and the Compact. Paragraphs 11 and 12 are not controversial. Paragraph 11 expresses the parties' intent that "[n]othing in this Decree is intended to affect a state's rights or obligations under the Compact, except as specifically addressed herein." Although that provision on its face might be read to suggest that the decree has altered the States' rights or obligations under the Compact, the Special Master's Report on Remand explains (at 14) that

paragraph 11 simply makes clear that the decree, in certain respects, "provid[es] * * * how such rights or obligations may be exercised or enforced." As so understood, paragraph 11 is unobjectionable as a statement of the resolution of disputed issues arising under the Compact. Paragraph 12 additionally provides that the States may invoke this Court's jurisdiction for purposes of enforcing or modifying the decree, and includes a salutary agreement among the States that they shall attempt to resolve disputes through negotiations before invoking the Court's retained jurisdiction.

Paragraph 10, however, is novel. It provides:

> Any of the obligations imposed on New Mexico by this Decree may be waived or modified by the Commission; provided that the parties hereto shall file notice of any such action with the Court. The Commission is also authorized to take any necessary and proper actions, not in violation of any provisions of the Compact, to implement the Compact purposes.

Proposed Decree ¶ 10. We suggest that this provision is inappropriate and should be deleted.

The first sentence of paragraph 10 is inappropriate because it would vest the Canadian River Commission with the power to modify or waive obligations imposed by a decree of this Court. We are aware of no other instance in which the Court has delegated that judicial power to another entity. Rather, when this Court enters a decree, it reserves to itself the power to determine whether changed conditions or other circumstances warrant a modification or waiver of the obligations imposed therein. See, *e.g.*, *Texas* v. *New Mexico*, 482 U.S. 124, 133 (1987). No reason

exists to depart from that practice in this case. The Special Master recommended inclusion of this sentence on the theory that an interstate compact is also a contract and "there would appear to be no reason why obligations under the Compact, as implemented by the decree, could not be waived in accordance with general contract law." Special Master's Report on Remand 12. The decree, however, operates as a judicial injunction. If the parties seek to have their rights determined by judicial decree, then they must also abide by the rules governing injunctions, including the longstanding rule that the court issuing an injunction is entitled to determine in the first instance whether to waive or modify the specified obligations. See, *e.g.*, *Howat* v. *Kansas*, 258 U.S. 181, 189-190 (1922).[1]

The second sentence of paragraph 10 is also inappropriate, because it is either surplusage or it gives the Commission powers beyond those granted by Congress in approving the Canadian River Compact. On the one hand, if that sentence is intended merely to acknowledge the Commission's existing powers under the Compact, then the sentence is unnecessary. On the other hand, if the sentence is intended to expand the Commission's powers beyond what the Compact provides, then the source of that authority is open to question. In either instance, the

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[1] Moreover, because the Compact has been approved by Congress, and in light of the constitutional requirement of the consent of Congress for any "Agreement or Compact" between one State and another (Art. I, § 10, Cl. 3), the States presumably could not alter the terms of the Compact itself without congressional approval. See *Texas* v. *New Mexico*, 462 U.S. 554, 564 (1983).

second sentence of paragraph 10 serves no proper and useful purpose. The Special Master recommended inclusion of this sentence on the theory that the Commission "may exercise the same kinds of ancillary powers as a federal administrative agency" and that "[t]his clarification should give the Commission (and perhaps other compact commissions) an incentive to deal more creatively with important problems that might otherwise not be addressed at all." Special Master's Report on Remand 13-14. A decree, however, should be formulated to resolve the case or controversy before the court, and not to create incentives for unrelated governmental action.[2]

[2] Unlike some other compacts, the Canadian River Compact does not expressly provide for the Commission to make findings and determinations on a broad range of matters that may arise in the administration of the Compact and water flows in the River. Aside from the record-keeping and reporting responsibilities specified in Article IX(c) and (d), 66 Stat. 77, the only other power expressly conferred on the Commission is to permit New Mexico and Texas, on a year-to-year basis, to impound more water than the amounts set forth in Articles IV and V. See Art. VII, 66 Stat. 76. Compare, *e.g.*, Pecos River Compact, Art. V, 63 Stat. 162-163 (see *Texas* v. *New Mexico*, 462 U.S. at 560, 565-567); Upper Colorado River Basin Compact, Art. VIII, 63 Stat. 35-37; Arkansas River Compact, Art. VIII(A) and (B), 63 Stat. 149-150.

We note that several paragraphs of the decree nevertheless contemplate a role for the Commission in matters arising under the Compact and decree. Most have to do with applying in various circumstances the Compact's basic distinction between storage chargeable to conservation and exempt storage. See ¶¶ 3-6; see also ¶ 7 (providing, consistent with Commission's past practice of waiving reporting requirements, that New Mexico dams with capacity of less than 100 acre-feet are not chargeable to conservation storage "unless otherwise determined by the

We have explained our reservations concerning paragraph 10 to counsel for New Mexico, Oklahoma, and Texas, and they have authorized us to state that they do not object to deletion of that paragraph.

Commission"), ¶ 8 (outlet works at Ute Reservoir not to be changed without Commission approval). Although the Compact does not expressly provide for the Commission to perform those functions, we are unaware of any indication that either the States that entered into the Compact or the Congress that consented to it intended to foreclose the Commission from doing so, at least where, as here, the Commission will act pursuant to an order of this Court entered on the motion of the States themselves. In fact, the Senate Report on the bill by which Congress gave its consent to the Compact states that the Commission would be "empowered to administer the compact," in addition to collecting water-flow data and making reports. S. Rep. No. 1192, 82d Cong., 2d Sess. 2 (1952). Moreover, the Commission may act only upon the unanimous vote of the Commissioners representing the three States. For these reasons, and because the Commission's role under the cited paragraphs of the decree is essentially to make subsidiary determinations in implementing the now-settled terms of the Compact and decree, we do not find the Commission's role under those paragraphs to be objectionable.

CONCLUSION

The Court should enter the proposed stipulated judgment and enter all of the proposed decree except paragraph 10.

Respectfully submitted.

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